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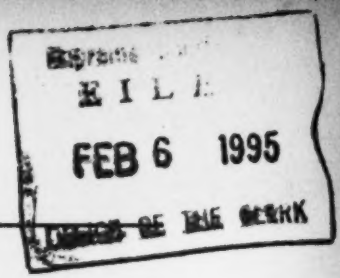


IN THE

**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1994

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MARIA PIROGLU,

PETITIONER,

v.

T.R.COLEMAN, ET AL.,

RESPONDENTS.

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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# REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Petitioner Maria Piroglu has petitioned for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

## ARGUMENT

Petitioner submits this reply brief: (1) to correct Respondent's repeated misstatement of fact -- that Piroglu was searched pursuant to a "drug-testing program," (2) to make clear that there was no "independent source" of the evidence upon which Piroglu's termination was based, and (3) to demonstrate that this Court has authority and should exercise its authority to review this case despite the fact that it was remanded to the District Court for further proceedings.

## I. THE SEARCH WAS AN ACT OF UNBRIDLED DISCRETION

Respondents repeatedly misstate a critical fact by suggesting that the urinalysis in this case was part of a "drug-testing program." Brief in Opposition at 7. In fact, the testing was not part of anything that can accurately be characterized as a "program." To the contrary, the written drug-testing policy in place at the time of the testing did not provide for the testing at issue. 16A n.2. Moreover, not only did the testing at issue lack any written authorization, no high-level management official verbally advised supervisors, such as Defendant Lead Inspector Hooper, which employees could be tested or when testing could take place.

Respondents admit that "some discretion was exercised (by supervisory

personnel . . .) as to when the test would be given." Brief in Opposition at 7-8. But, in fact, first level supervisors exercised unbridled discretion over whether to test, when to test, and whom to test. Respondents point to the fact that these supervisors had consistently tested all trainees. But the degree of consistency with which discretion is exercised is beside the point. In the absence of a warrant, written regulations are needed to eliminate discretion and thereby insure that it cannot be abused.

This case clearly presents this Court with the question of whether a first level supervisor's compulsion of a public employee's urination for testing is unreasonable in the absence of either a warrant or of written regulations and/or policies that eliminate discretion over whom to test, when to test, and for

what to test.

## II. THE UNCONSTITUTIONAL SEARCH WAS THE SOLE SOURCE OF THE EVIDENCE UPON WHICH PIROGLU'S TERMINATION WAS BASED

By citation to this Court's decision in **Murray v. United States**, 487 U.S. 533 (1988), Respondents suggest that there was an "independent source" of the evidence that formed the sole basis of Piroglu's termination. But there was not.

In **Murray**, this Court considered whether the "independent source" doctrine applied "only to evidence obtained for the first time during an independent lawful search" or also to "evidence initially discovered during, or as a consequence of, an unlawful search, but later obtained independently." 487 U.S. at 537. This Court held that the doctrine applies in both these situations. But in this case, the

evidence was not independently obtained before or after the illegal search, only during the illegal search.

Respondents are thus not actually relying on this Court's "independent source" doctrine, but rather on a novel extension of that doctrine. Respondents do not argue that the evidence was discovered independently by lawful means; they simply content that it could have been. Respondents state, "The sample would not have been different had the second witness been absent." Brief in Opposition at 9. The criminal corollary of this argument is that evidence seized during a warrantless search should be admitted if it would have been discovered even if the police had obtained a warrant. Just as the absence of a warrant may render a search unconstitutional, the presence of the observers rendered the search in this

case unconstitutional; and the unconstitutional search was the sole source of the evidence upon which the termination was based. The unconstitutional search was thus both the "but for" and proximate cause of the discharge.

Respondents, in fact, do not contest the fact that the unconstitutional search caused Piroglu's discharge. Rather, they assert that this Court has adopted some notion of commensurability to deny plaintiffs compensation for all injuries caused by a violation of the Constitution. But even the cases cited by Respondents use the terms "compensatory" and "causation" not "commensurate." Brief in Opposition at 8-9. This Court has never authorized lower courts to weigh violations of the Constitution against the damage they cause and deny complete relief based on

some notion of commensurability not rooted in the principal of causation.

This case clearly presents this Court with the question of whether a public employer's unconstitutional search of a public employee, which yields the sole grounds for the employee's termination, is the cause of the termination for purposes of awarding damages.

## III. THIS COURT HAS AUTHORITY TO REVIEW THIS CASE

Respondents suggest that this Court should not review the causation question because the Court of Appeals remanded the case to the District Court for a trial on liability. But this Court clearly has authority to review this case and should use its authority.

28 U.S.C. section 1254(1) grants this Court plenary authority to review cases in the courts of appeal "before or

after rendition of judgment or decree." It is not unusual for this Court to review questions resolved by a court of appeals in the course of a decision remanding a case for trial. **See, e.g., Blue Chip Stamps v. Manor Drug Stores**, 421 U.S. 723, 727 (1975); **Land v. Dollar**, 330 U.S. 731, 734 n.2 (1947).

In fact, this Court has on several occasions granted review to decide questions, like that at issue in this case, concerning the categories of damages that may be recovered after a trial that had not yet been conducted. In **Gillespie v. United States Steel Corp.**, 379 U.S. 148 (1964), this Court reviewed a decision of a court of appeals, in an interlocutory appeal, affirming a district court's pretrial decision to strike a wife's claims under the Jones Act to damages on behalf of her deceased husband's siblings. **Id.** at 153.

Similarly, in **United States v. General Motors Corp.**, 323 U.S. 373 (1945), this Court reviewed a decision reversing a district court's ruling that excluded all evidence of damages resulting from the taking of private property other than evidence of the value of the property itself. **Id.** at 367. In each case, this Court based its ruling on the importance of the question raised and the fact that it was "fundamental to the further conduct of the case." **Gillespie**, 379 U.S. at 153.

This Court should similarly use its plenary authority in this case because of the far-reaching importance of the question raised, the fundamental effect an answer will have on the further conduct of this case, and the procedural difficulties that Piroglu will face in bringing the question back before this Court if it declines review at this time.

If this Court declines review, this case will be remanded to the District Court. If Piroglu prevails on the issue of liability, she will be awarded damages only for the pain and suffering resulting from the unconstitutional search. In order to again ask this Court to review the question of whether the search was the cause of her termination, she will have to return to the Court of Appeals. But in order to do this, she will have to seek review of a question on which the Court has already ruled. Piroglu should not be forced to file what might be characterized as a frivolous appeal in order to obtain review in this Court. This Court should use its plenary authority to review both of the important questions raised by this case at this time.

## CONCLUSION

For the above-stated reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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